Supreme Court, U.S.
FILED
NOV 30 1993

93-978

No. ( )

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IRWIN KOFF,
DARLINE RUTH KOFF,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEAL

PETITON FOR WRIT OF CERTIORARI

IRWIN KOFF
DARLINE RUTH KOFF
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38 pp

QUESTIONS PRESENTED

1. DOES FAILURE TO ASSESS A TAX, AS REQUIRED UNDER 26 U.S.C. 6203, STATE A CAUSE OF ACTION UNDER 28 U.S.C. 2410(a) TO QUIET TITLE AGAINST LIENS CLAIMED BY THE UNITED STATES?

2. DOES A "CERTIFICATE OF ASSESSMENTS AND PAYMENTS" PROVE AN ASSESSMENT WAS ACTUALLY MADE AND SATISFY THE REQUIREMENT OF SUPPLYING A COPY OF THE RECORD OF ASSESSMENT, AS REQUIRED UNDER 26 U.S.C. 6203?

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OPINIONS BELOW

The opinion of the appellate court is published, and is reprinted in the appendix (p. 14). The initial memorandum of the appellate court is not published and is reprinted in the appendix (p. 25). The order and opinion of the district court is not published and is reprinted in the appendix (p. 29).

JURISDICTIONAL GROUNDS

Petitioners, Irwin and Darlene Ruth Koff, in proper person, respectfully petition this Court for a Writ of Certiorari to review the judgement rendered in this case by the Ninth Circuit Court of Appeals. The opinion was entered on September 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are:

26 U.S.C. 6203--Method of Assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules and regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 C.F.R. 301.6203-1--Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, in all other cases the amount of the assessment shall be the amount shown on the supporting list or

record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amount assessed.

28 U.S.C. 2410(a)--Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter---

(1) to quiet title to, real or personal property on which the United States has or claims a mortgage or other lien.

Evidence Rule 803--Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in

any form, or the nonoccurence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

Evidence Rule 1004--Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Evidence Rule 1006. Summaries.

The contens of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

STATEMENT OF THE CASE

On February 12, 1990 the Internal Revenue Service (IRS) began issuing various notices of federal tax lien and notices of levy claiming petitioners owed over $200,000 for "1040" taxes for the periods 1982-85. On December 17, 1990 petitioners requested copies of the records of assessment as provided for under 26 U.S.C. 6203. When the United States failed to produce any such records, petitioners brought the instant suit on February 8, 1991. The relief requested in the Complaint was that the Court either compel the United States to produce copies of the alleged records of assessment for the relevant periods as required under §6203, or in the alternative, pursuant to 28 U.S.C. 2410(a), to quiet title against the liens claimed by the IRS.

The district court determined that any claim regarding the procedural regularity of assessments would constitute a challenge to their merits, and therefore could not be addressed under 28 U.S.C. 2410(a). The court then, characterizing the complaint as "convoluted and cryptic", transformed the issue into one of whether or not notice and demand for payment had been issued as required under 26 U.S.C. 6303(a). Based on the above ruling, and on documents the government manufactured on April 8, 1991 (and submitted shortly thereafter) called "Certificates of Assessments and Payments", the court ruled that the notices required under 6303(a) had been issued, and granted judgement to the United States. The mandamus portion of petitioner's suit for the records of assessment was not addressed.

On appeal, petitioners argued the error of the district court's conclusion that allegations of the IRS' failure to assess were not cognizable under 28 U.S.C. 2410(a), and pointed to the Ninth Circuit's decision in *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991) in support of that argument. Petitioners further pointed out the trial court's total failure to address the mandamus portion of their suit.

The appellate court initially affirmed the trial court in an unpublished opinion on October 23, 1992. Relying on its decision in *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990), the court held that petitioners' allegations regarding lack of assessments was an "attack on the merits of the assessment," and therefore could not be addressed in an action under the waiver of immunity in §2410(a). For the same reason, it held that petitioners were not entitled to copies of the actual record of assessment sought in the mandamus cause of action. (See opinion in Appendix, p. 25)

On petition for rehearing, Koffs pointed out the apparent conflict between *Elias* and *Arford* regarding the relevance of assessments in quiet title actions under §2410(a). Koffs further pointed out that they had an absolute right to copies of the actual records of assessment under the plain language of 26 U.S.C. §6203. The court granted rehearing on March 1, 1993, and filed a new opinion on September 1, 1993.

In separate, but concurring opinions, the panel disagreed as to whether a conflict existed between the above two cases, but acknowledged there may be one. Judge Ferguson held that any conflict need not be resolved, and proceeded to affirm the case on its merits based on "hypothetical jurisdiction". Judge O'Scannlain held that *Elias* and *Arford* were plainly in conflict, that the conflict went to the "very jurisdiction to hear this appeal", and screamed for en banc review instead of rendering a decision. Judge Rymer ruled that *Elias* and *Arford* were not in conflict, and stated that, although a claim that "no proper assessment was made" is barred under §2410, a claim that a "defect in the recording of an assessment" (or in the transmission of a copy of it to the taxpayer) is proper. The court flatly denied petitioners' mandamus cause of action for production of any actual records of assessment.

REASONS FOR GRANTING THE PETITION

A. Conflict Within And Among The Circuits Regarding Application of 28 U.S.C. §2410(a).

This Court should grant certiorari in this case because the appellate court has rendered a decision which not only conflicts with other appellate courts, but conflicts within itself. The panel in this case could not even agree on how to decide the case and refused to call for the en banc review necessary to resolve a conflict. Petitioners submit that the Ninth Circuit's decisions in *Elias* and *Arford* are in plain conflict, and the court is apparently unwilling to resolve it. As Judge O'Scannlain stated in his separate opinion, such a conflict will do nothing but lead to "abiding uncertainties in our circuit law, undermining the predictability and uniformity of treatment for which we are bound to strive." If the opinion is left as is, litigation on this issue within the Ninth Circuit will become nothing more than a "crap shoot". Some will be able to raise and litigate the issue, while others will not. For this reason alone, certiorari is warranted. However, it is not the only reason, since a conflict exists between the circuit courts as well on the issue.

In *Robinson v. United States*, 920 F.2d 1157 (1990), the 3rd Circuit specifically disagreed with the 9th Circuit's decision in *Elias*, and held that the "merits" of an assessment refers to the "amount, if any, of tax due." 920 F.2d at 1161. (This is essentially the same conclusion the 9th Circuit made in *Arford*, 934 F.2d at 232, a case decided after *Robinson*). In *Guthrie v. Sawyer*, 970 F.2d 733 (1992) the 10th Circuit held that "while a quiet title action may not be used to seek review of the amount of tax liability assessed, the statute does waive sovereign immunity with respect to procedural violations arising from assessment, levy, and seizure." *Id.* at 735. "[T]he alleged failure of the IRS to assess properly" is a defect "cognizable in a quiet title suit." *Id.* at 737. In reaching this decision, that court reversed a prior contrary ruling in *Schmidt v. King*, 913 F.2d 837, 839 (10th Cir. 1990), a decision which had also been criticized by the 3rd circuit in *Robinson*. In *Geiselman v. United States*, 961 F.2d 1 (1992), the 1st Circuit also ruled in

agreement with the above decisions (but held that lack of a deficiency notice [as opposed to an assessment] is not cognizable in a quiet title action).

In direct conflict with the above decisions, the 5th Circuit ruled in *McCarty v. United States*, 929 F.2d 1085 (1991) that the district court lacked jurisdiction over any claim that "the IRS did not file a valid assessment." *Id.* at 1088. (This, of course, is the same ruling the 9th Circuit made in *Elias v. Connett*, 908 F.2d at 527 (1990)). The *McCarty* court also claims to rely on *Robinson* for the proposition that the existence or validity of a tax assessment is not contestable in an action under §2410. *Id.* at 1088 (citing *Robinson* at 1161). However, the *Robinson* court never made any such statement.

The courts of appeal are in conflict with each other over the issue of what is cognizable in a suit under 28 U.S.C. §2410(a), and the 9th Circuit is in conflict with itself. Such a conflict within one circuit can do nothing but lead to disasterous results. As happened in this case, the result of such a conflict was the district court ruling that an issue (the existence of a valid assessment) was irrelevant for purposes of a quiet title suit, yet, the appellate court ruled on the propriety of the evidence submitted by the government on that issue. If the issue was irrelevant for purposes of the trial court, then the only issue for appeal was whether or not that court erred on its ruling of relevance, not the propriety of the evidence submitted. Therefore, petitioners submit the appellate court over-stepped its bounds in this case, and should have limited itself to determining whether the lower court was correct in its ruling. This, of course, would have required a resolution of the conflicting decisions in *Elias* and *Arford*.

Equally troubling is the appellate court's ruling that petitioners are not entitled to an actual copy of any record of assessment pertaining to them when 26 U.S.C. §6203 explicitly states the opposite. Instead, the court held that the IRS' made-for-litigation "Certificates of Assessments and Payments" satisfy

the statutory requirement, even though such documents are not recognized in any statute or regulation anywhere, and they did not even exist until well after the suit was started. The IRS just made them up expressly for litigation. Moreover, since they did not exist prior to suit, they could not possibly have been a "copy" of any alleged prior assessment. Therefore, the appellate court has sanctioned an activity which directly conflicts with a clear congressional mandate.

B. Conflicts Regarding Evidence.

As set forth above, the appellate court held that the government's summary record "Certificates of Assessments and Payments" were "proof" of assessments and of notices being issued. Although these "Certificates" did not even exist until April 8, 1991, they alleged to pertain to activities dating *years* back. They consisted merely of columns and rows where dates were entered across from an alleged activity. The alleged activity was characterized in single words such as "assessment", or "notice". No signature of any assessment officer appeared anywhere on these documents.

The appellate court, relying on its published decision in *Hughes v. United States*, 953 F.2d 531 (1992), and the 10th Circuit's decision in *James v. United States*, 970 F.2d 750, 755 (1992), held the "Certificates" are "probative evidence in and of themselves and, in the absence of contrary evidence, are sufficient to establish that ... assessments were made." In *Hughes* the court held such "Certificates" are public records under Fed. R. Evid. 803(8) and (10),[1] and that they are not

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[1] This holding would seem to conflict with the ruling in *Church of Scientology of California v. IRS*, 484 U.S. 9 (1987) where this Court held that 26 U.S.C. 6103 "lays down a general rule that" tax information is confidential. Id. at 10. If such information is confidential, it cannot possibly be a "public record" at the same time.

summary records under Evidence Rule 1006, but "official documents" and "probative evidence in and of themselves". Id at 540. The *Hughes* court mentioned nothing about the timeliness of the "Certificates" it had under consideration there, and the appellate court in this case failed to consider it here. Further, while the court held these "Certificates" are "official documents", there simply is no internal revenue statute or regulation which even recognizes them.

Up until recently it was not known just how the IRS' "Certificates" came into existence. There is no internal revenue statute or regulation which even mentions them, nor does it appear they are the result of any duty of law, or any type of report made as a result of compliance with any law. It was finally unearthed in the Fifth Circuit case of *United States v. Buford*, 889 F.2d 1406 (1989) that the "Certificates" are the result of translations of codes from an IMF computer record.[2] It was discovered in that case that the "Certificates" were hand prepared using information taken from the IMF, and that the "Certificates" "had been prepared specifically for trial." *Buford* 889 F.2d at 1408.

The Fifth Circuit reversed Buford's conviction because it found "no authority for the district court's action" of allowing "Certificates" to be utilized, over objection, "without the underlying official record [IMF]" (citing F. R. Evid. 1004). Id. Moreover, it found specific error because there were indications from other records which showed the IMF did not support the contentions made in the "Certificates", i.e. a failure to file a

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[2] An "Individual Master File" (IMF) consists of pages of coded information on individuals. It is maintained on a computer in the Martinsburg Computer Center (MCC), which is located in Martinsburg, West Virginia. The information on the IMF must be "decoded" to be comprehensible. See *United States v. Buford*, 889 F.2d 1406, 1407-8 (5th Cir. 1989).

return.[3] Buford's case is not alone in finding the government's "Certificates" to be erroneous. *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987) (computer transcript found to be incorrect with no explanation); *Blackston v. United States*, 778 F.Supp. 244, 91-2 USTC 50,585 (1991) ("Certificates" found to be inconsistent, government refused to offer any explanation). Other courts have also held that an assessment is only valid when signed by an assessment officer, and cannot be proven by mere authentication of a certificate. *Brafman v. United States*, 384 F.2d 863, 865-66 (5th Cir 1967).

Thus, while the Ninth Circuit holds that, without question, the government's "Certificates" are "proof", in and of themselves, of whatever is entered on them (except for the issuance of notices),[4] other courts have held them to be secondary evidence, and/or found them to be erroneous altogether. This conflict should be resolved, particularly in view of the fact that there is absolutely no statute or regulation which even authorizes the use of these "Certificates", nor anything which controls their content or accuracy.[5] Yet, the

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[3] Indeed, in Buford's second trial, the government mysteriously was able to produce the return which was alleged in the "Certificates" to have not been filed. See unpublished opinion in Buford's second appeal, *U.S. v. Buford*, 91-1447 (May 6, 1992), p. 3.

[4] In *Farr v. United States*, 990 F.2d 451, at 454 (1993), the Ninth Circuit held that the IRS' "Certificates" are not conclusive evidence for proving the issuance of notices.

[5] It would appear from the *Buford*, *Blackston*, and *Berman* cases that the government's "Certificates" are highly unreliable, and if it is allowed to continue this practice, an opposing party should be allowed ample discovery of the records underlying the "Certificates", in accordance with Rules 1004 and 1006.

government appears to use them consistently in both civil and criminal litigation in order to prove some part of its case. The *Buford* case shows the danger of allowing such a practice to continue. When people can be convicted through the government's use of fabricated information and records, petitioners submit this Court's attention is warranted, if not required.

Petitioners believe this Court's ruling in *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477 (1943) would govern the evidentiary issues presented here. In that case, a railroad accident report was held inadmissible as a business record, even though it was required to be made by regulations. This Court held such a record was "not a record made for the systematic conduct of the business as a business." 318 U.S. at 113. Consequently, it was held inadmissible. The case is no different here. The IRS does not use any "Certificates of Assessments and Payments" in the regular course of its activities. It uses them exclusively for litigation. Further, unlike *Palmer*, the IRS' "Certificates" do not even come into existence as the result of complying with any regulation. They are made solely for "evidence" in a court case. Therefore, petitioners contend the Ninth Circuit, as well as others, are simply ignoring a prior ruling of this Court on the admissibility of evidence, and sanctioning a practice this Court has previously condemned.

CONCLUSION

The public perception today is that the IRS is above the law and can do anything it wants. Many perceive it as a rogue agency which is out of control with nothing that can be done to stop activities which violate even its own procedures.

The issue before this Court is essentially whether or not the IRS must fully and strictly comply with all the requirements of the Internal Revenue Code prior to engaging in administrative collection action and, if so required, what remedy may exist for addressing noncompliance. Congress has not provided any

remedy within the Code itself for a court to enjoin collection or challenge tax liens when the IRS' compliance with the pre-collection requirements of the Code is at issue. At present, the sole pre-collection remedy appears to be a suit to quiet title under 28 U.S.C. §2410(a).

The 9th Circuit has held that, because of the extraordinary power afforded, the IRS is required to strictly comply with the Internal Revenue Code collection procedures. *Goodwin v. United States*, 935 F.2d 1061, 1065 (9th Cir. 1991) (citing *Kulawy v. United States*, 917 F.2d 729 (2d Cir. 1990)). However, with the various decisions holding that the issue of assessments cannot be addressed in a quiet title suit, some courts are essentially picking and choosing those procedures which are required to be followed, and discarding others. Congress could not have intended that the IRS only be required to follow some procedures and ignore others. However, if the IRS' alleged non-compliance with a particular procedure cannot be challenged, how is the Internal Revenue Code to be enforced against the IRS? How is the public allowed to challenge what is essentially illegal collection action, and violations of their rights to due process?

In addition, the 9th Circuit has rendered a decision which essentially states it will not resolve a conflict within its own cases as to what procedural issues are cognizable in an action to quiet title. Moreover, it, as well as some other appellate courts, are undoubtedly carving out exceptions to the rules of evidence *just for tax cases* by their rulings on the admissibility and propriety of the IRS' made-for-litigation "Certificates", documents which are mere summary records of translations of computer codes. Petitioners have found no similar evidentiary rulings, outside of tax cases, where records of this type were merely accepted at face value without any foundational requirement whatsoever. It goes without saying that when a court will blindly accept as evidence one party's mere contentions contained in a summary record (which was made

just for litigation) and not require anything more, the result of such a case is a foregone conclusion. Petitioners believe this state of affairs calls for this Court's attention.

DATE: November 27, 1993.

Submitted by,

Irwin Koff
Darline Ruth Koff

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRWIN KOFF; DARLINE RUTH KOFF,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 91-16839
D.C. No.
CV-91-00172-DFL
OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted October 8, 1992*
Memorandum Disposition Filed October 23, 1992
Memorandum Withdrawn: September 1, 1993
San Francisco, California

Filed September 1, 1993

Before: Warren J. Ferguson, Diarmuid F. O'Scannlain, and Pamela Ann Rymer, Circuit Judges.

Per Curiam; Concurrence by Judge Ferguson; Concurrence in the judgment by Judge O'Scannlain; Concurrence by Judge Rymer

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

SUMMARY

Tax/Tax Liens/Administrative Law

The court of appeals affirmed a judgment of the district court. The court held that Certificates of Assessments and Payments were probative evidence sufficient to establish that assessments underlying tax liens were properly made.

The IRS liened against property of appellant Irwin Koff. Pursuant to statute, Koff requested a copy of the record of assessment. The government provided him with Certificates of Assessment on Form 4340. Koff sued to quiet title, contending that the liens were procedurally defective because he was entitled to the summary record of assessment on Form 23C signed by the assessment officer. Koff did not challenge the assessments themselves. The district court granted summary judgment for the government. Koff appealed.

[1] The statute's implementing regulations permissibly interpreted satisfaction of the requirement to be achieved by production of the Certificates of Assessment. Thus, Koff received the documentation to which the statute entitled him. [2] In the absence of evidence from Koff to the contrary, the Certificates in and of themselves were probative evidence that the assessments were properly made.

Judge Ferguson, concurring, opined that the wisest course was to assume without deciding that jurisdiction existed under the doctrine of hypothetical jurisdiction and proceed to the merits.

Judge O'Scannlain, concurring in the judgment, opined that a conflict in precedents prevented jurisdiction and required recommendation of an en banc hearing.

Judge Rymer, concurring, opined that Koff's claim that no proper assessment was made was jurisdictionally barred,

although his claim that the IRS's procedural failure in assessment rendered the lien invalid was cognizable.

COUNSEL

Irwin Koff, Darline Ruth Koff, pro se, Red Bluff, California, for the plaintiffs-appellants.

Gary R. Allen, Tax Division, United States Department of Justice, Washington, DC, for the defendant-appellee.

OPINION

PER CURIAM:

Upon rehearing, we contemplate the extent to which 28 U.S.C. § 2410 waives the United States' sovereign immunity from suit in tax cases. Our previous unpublished memorandum, filed October 23, 1992, is withdrawn.

I

Irwin and Darline Koff ("the Koffs"), acting pro se, brought suit pursuant to 28 U.S.C. § 2410(a) to quiet title to certain of their property on which the IRS had placed federal tax liens. The Koffs allege that the liens are procedurally defective, hence invalid. The district court granted summary judgment in favor of the government. We affirm.

The Koffs predicate their claims for relief on 26 U.S.C. § 6203, which provides that, "[u]pon request of the taxpayer, the secretary shall furnish the taxpayer a copy of the record of the assessment." The Koffs assert that this section entitles them to a copy of the actual document by which the assessment was effected, namely, the "summary record of

assessment" on Form 23C. *See* 26 C.F.R. § 301.6203-1 ("The assessment shall be made by an assessment officer signing the summary record of assessment."). That the government has failed to produce a copy of the summary record of assessment, they say, implies that no such document exists. The Koffs conclude that a proper assessment has not been proved, and that the liens placed on their property are thus invalid, and should be removed. We reject this analysis.

II

At the threshold, we must determine whether we can reach the merits of the Koffs' suit. The answer hinges on whether section 2410 serves to abrogate the United States' sovereign immunity with respect to suits of this kind. This may be a question as to which our decisions are in conflict. *Compare Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990), *with Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). For the reasons stated in the separate opinions of Judges Ferguson, O'Scannlain, and Rymer, however, we proceed to the merits of the Koffs' claim.

III

[1] We reject the Koffs' contention that section 6203 entitles them to a copy of the summary record of assessment on Form 23C upon request. The regulations promulgated under this section state that "[i]f the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed." *Id.* This represents a permissible interpretation of section 6203, and we are therefore bound to give it deference. Since the government has produced Certificates of Assessments and Payments on Form 4340, which set forth all the information this regulation requires, the Koffs have already been given all the documentation to which they are entitled by

section 6203. *See James v. United States*, 970 F.2d 750, 755 (10th Cir. 1992) ("notices [of assessment] also satisfy 26 U.S.C. § 6203, the requirement that the IRS provide a copy of the record of assessment").[1]

[2] It is settled in this circuit that Certificates of Assessments and Payments are "probative evidence in and of themselves and, in the absence of contrary evidence, are sufficient to establish that ... assessments were properly made." *Hughes v. United States*, 953 F.2d 531, 540 (9th Cir. 1992). The Koffs presented no evidence whatsoever regarding the assessment made against them. Accordingly, the judgment of the district court is

AFFIRMED.

FERGUSON, Circuit Judge, concurring:

I concur in the judgment. I write separately to explain why we need not use this case to resolve any conflict that exists between *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990) and *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). As Part III of the per curiam opinion makes clear, the Koffs' claim is entirely insubstantial on the merits: they have produced no evidence that there actually was a procedural defect in the notice of assessment. Because the jurisdictional question is quite difficult, our wisest course is to assume without deciding that jurisdiction exists and proceed to affirm on the merits. We have unequivocally held that we are constitutionally empowered to do so under the doctrine of hypothetical jurisdiction. *See Clow v. United States Dep't. of Hous. & Urban Dev.*, 948 F.2d 614, 616 n.2 (9th Cir. 1991) (per curiam).

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[1]The Koffs have asked that we issue a writ of mandamus compelling the IRS to produce a copy of their summary record of assessment. The request is denied.

Judge O'Scannlain believes we have no jurisdiction to resolve this case on its insubstantial merits because he apparently continues to adhere to his dissenting stance in *Clow*. However, as Judge O'Scannlain explains in his concurrence in the case at bar, this panel has "no authority to overrule the decision of any other three-judge panel of this court." *Clow* is binding precedent on the scope of our jurisdiction until the Supreme Court or this court sitting en banc holds otherwise.

In *Geiselman v. United States*, 961 F.2d 1 (1992) (per curiam), the First Circuit was faced with a jurisdictional dispute strikingly analogous to the case at bar. I fully agree with that court's approach: "The government argues ... that the district court had no jurisdiction under Section 2410 to consider the alleged defect in the notice of deficiency.... We need not attempt to split this jurisdictional hair because we find no evidence that any of the alleged defects existed." *Geiselman*, 961 F.2d at 4 n.1.

O'SCANNLAIN, Circuit Judge, concurring in the judgment:

I agree that Part II of the per curiam opinion represents the proper resolution of the merits of the taxpayers' arguments in this case. I believe, however, that this panel ought never to have reached the merits. In my view, there is a conflict in this court's precedents that prevents us from asserting jurisdiction here, and requires that we recommend that this case be decided by our en banc court.

I

It is settled that 28 U.S.C. § 2410 serves to abrogate the United States' sovereign immunity from suit only with respect to challenges to "the procedural validity of a tax lien" — "[a] taxpayer may not use a section 2410 action to collaterally attack the merits of an assessment." *Elias v. Connett*, 908 F.2d

521, 527 (9th Cir. 1990). *See Powelson v. United States*, 979 F.2d 141, 145 (9th Cir. 1992); *Hughes v. United States*, 953 F.2d 531, 538 (9th Cir. 1992); *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). Our cases agree on this much. They differ, however, with respect to how the line is to be drawn between a challenge to "the procedural validity of a tax lien" and a challenge to "the merits of an assessment."

A

In Elias, we held that a taxpayer's allegation that "a lawful assessment against him does not exist" goes to "the merits of [his] assessment rather than the procedural validity of the IRS's lien," and thus does not state a claim cognizable under section 2410. *Elias*, 908 F.2d at 527. The Koffs allege that the tax lien placed on their property is invalid because the IRS did not properly follow its internal procedures in effecting the assessment upon which the lien is based. Although the legal result for which the Koffs contend is that the *lien* is invalid, the basis of this contention is that "a lawful assessment against [them] does not exist." Under *Elias*, then, the Koffs' suit constitutes an attack on the merits of their assessment, to which the waiver of sovereign immunity in section 2410 does not extend.

B

In *Arford*, the taxpayers "alleged that the government [] did not assess their taxes as required by [section] 6203." 934 F.2d at 231. Without discussing *Elias*, we held that this allegation stated a claim cognizable under section 2410: "to the extent [the Arfords] are challenging the procedural lapses of the assessment under § 6203, 28 U.S.C. § 2410 does serve as a waiver of sovereign immunity." *Id.* at 232. The Koffs' allegation that the IRS did not properly follow its internal assessment procedures is indistinguishable from the Arfords' claim "that the government [] did not assess their taxes as required by" law. Under *Arford*, then, the Koffs' suit presents a claim

of "procedural lapse[]" which falls within the waiver of sovereign immunity in section 2410.

II

To my mind, *Elias* and *Arford* are plainly in conflict. Moreover, I believe that en banc resolution of this conflict is unavoidable, for I am unable to agree with either of the approaches my colleagues have taken in this matter.

Judge Ferguson would avert the need to recognize the conflict between *Elias* and *Arford* by assuming for purposes of decision that we have jurisdiction, and deciding this case on the merits. This sort of solution is undeniably an attractive and, in general, a useful one. Under the circumstances, however, I believe it is unavailable to us. As I have explained at length elsewhere, I believe we are forbidden to *assume* we have jurisdiction to exercise the judicial power created by Article III and vested in us by statute. *See Clow v. United States Dep't of Housing & Urban Dev.*, 948 F.2d 614, 619 (9th Cir. 1991) (O'Scannlain, J., dissenting).

Judge Rymer, meanwhile, would attempt to reconcile *Elias* and *Arford*. With respect, I think her attempt does not succeed. Section 6203 provides (1) that assessments must "be made . . . in accordance with rules and regulations prescribed by the Secretary," and (2) that "a copy of the record of the assessment" must be given the taxpayer "upon request." *Arford* held that a claim of "procedural lapses of the assessment under § 6203" is cognizable under section 2410. Judge Rymer would "read th[is] language . . . to mean that § 2410 allows a taxpayer to make the procedural argument that she did not receive notice of her assessment which is required by § 6203 and that a tax lien is therefore invalid." That is, Judge Rymer would read *Arford* as extending only to the second requirement of section 6203, not to the first.

I cannot accept this approach for, unfortunately, this is assuredly not what *Arford* actually held. Neither the language

of the opinion nor the facts in *Arford* provide any basis for reading the phrase "procedural lapses in the assessment" to mean only "failure to provide a copy of the record of the assessment upon request." The Arfords did not allege only the latter sort of failure. They allege that the government "did not assess their taxes as required" by law. In holding that this allegation stated a claim under section 2410, *Arford* in no way implied that the only "procedural lapses" that counted were those that involved failure to provide the taxpayer with required documentation.

III

Sitting as a three-judge panel, we have no authority to overrule the decision of any other three-judge panel of this court. *See, e.g., United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989). Neither do we have the power to "make [a] choice between two opposing lines of authority." *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988), *overruled en banc, United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc). Further, in this instance, we are not permitted to assume the irrelevance of the conflict for purposes of decision, because the conflict goes to our very jurisdiction to hear this appeal. Finally, I see no way to bring about a persuasive and final reconciliation between the cases that are the source of the conflict.

I believe we do ourselves little credit, and the lawyers and litigants who practice before us little good, when we ignore an irreconcilable conflict in our decisions. We must inevitably produce such conflicts. To be sure, we can paper them over easily enough. But in doing so we tolerate and, indeed, encourage, abiding uncertainties in our circuit law, undermining the predictability and uniformity of treatment for which we are bound to strive. The law of this circuit, in short, is far more likely to develop in a rational fashion when we acknowledge our mistakes and move quickly to correct them than when we contrive to disavow them.

In any event, we have declared that "the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision," and that "[a] panel faced with such a conflict *must* call for an en banc review." *Hardesty*, 977 F.2d at 1348 (quoting *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 989 (1988)) (emphasis in *Hardesty*). Although the legal issue presented here is not as significant as many we face, en banc reconsideration is nonetheless "necessary to secure . . . uniformity of [our] decisions." Fed. R. App. P. 35. We are thus bound to recommend that this case be heard by the en banc court. Rather than render a decision in this matter, I would make such a recommendation.

RYMER, Circuit Judge, concurring:

I concur in the judgment but write separately because I believe the Koffs' claim that no proper assessment was made against them is jurisdictionally barred. *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990) ("A taxpayer may not use a section 2410 action to collaterally attack the merits of an assessment."). However, their claim that the IRS's failure to follow the assessment procedures of 26 U.S.C. § 6203 renders the tax lien against them invalid is cognizable under § 2410. *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991); *see also Elias*, 908 F.2d at 527; *James v. United States*, 970 F.2d 750, 755 (10th Cir. 1992).

Judge O'Scannlain opines that *Elias* and *Arford* are in conflict, because *Arford* permits a challenge under § 2410 to "the procedural lapses of the assessment under § 6203." 934 F.2d at 232. Judge O'Scannlain reads this language as conflicting with the rule of *Elias* that § 2410 may not be used to challenge the validity of an assessment.

I read *Arford* to hold that § 2410 allows a taxpayer to make a procedural argument that a defect in the recording of an

assessment or in the transmission of a copy of the record of assessment renders a tax lien invalid. To read *Arford* to mean that § 2410 permits a procedural challenge to the assessment itself is to create conflict where there is none and to assume that the *Arford* panel badly misread *Elias*, on which it relied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRWIN KOFF and DARLINE RUTH KOFF,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

_____/

No. 91-16839

D.C. No. CIV.S-91-172-DFL

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
David f. Levi, District Judge, Presiding
Submitted October 8, 1992**
San Francisco, California

Before: **FERGUSON, O'SCANNLAIN,** and **RYMER,** Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

Irwin and Darline Koff ("the Koffs"), acting pro se, brought suit pursuant to 28 U.S.C. §2410(a) to quiet title to certain of their property on which the IRS had placed federal tax liens. The Koffs alleged the liens were procedurally defective, hence invalid, because the IRS had failed to make an appropriate assessment under section 6203 of the Internal Revenue Code. The district court, citing this court's decision in Elias v. Connett, 908 F.2d 521 (9th Cir. 1990), concluded that such a challenge amounted to a collateral attack on the merits of the assessment, and as such could not be maintained under the guise of an action to quiet title.

We agree. Section 2410(a) serves to abrogate the United States sovereign immunity from suit only with respect to procedural challenges to the validity of its liens. In Elias we held that a taxpayer's allegation that "a lawful assessment against him does not exist" goes to "the merits of [the] assessment rather than the procedural validity of the IRS's lien," and therefore is insufficient to state a claim under section 2410(a). 908 F.2d at 527. Cf. United States v. Polk, 822 F.2d 871 (9th Cir. 1987) (allegation that tax lien was improperly filed with county recorder by IRS treated as procedural attack supporting quiet title action under section 2410(a)). the district court properly refused to entertain the Koffs' challenge to the appropriateness of the procedures employed in affecting the assessment, which goes to the merits thereof.[1]

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[1] The district court proceeded to construe the Koffs' suit as an allegation that they had not received the notice of assessment and demand for payment required by 26 U.S.C. §6303(a). As our cases have recognized, this type of allegation, which goes to whether the IRS"s lien is enforceable rather than whether its assessment is valid, represents a claim of procedural irregularity cognizable under section 2410(a). See Hughes v. United States, 953 F.2d 531,

The Koffs further allege that the lien was procedurally defective because the IRS failed to comply with section 6203's requirement that, "[u]pon request of the taxpayer, the secretary shall furnish the taxpayer a copy of the record of the assessment." 26 U.S.C. §6203. The Koffs argue that this section entitles them to a copy of the actual document by which the assessment was effected, namely, the "summary record of assessment" on Form 23C. See 26 C.F.R. §301.6203-1 ("The assessment shall be made by an assessment officer signing the summary record of assessment."). They insist that the Certificates of Assessments and Payments on Form 4340 which the government had produced in connection with this litigation are insufficient to satisfy section 6203, despite the fact that they meet the requirements of the regulations promulgated thereunder. See id. ("If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.").

We need not reach the question of whether the above regulation represents a permissible interpretation of section 6203. The Koffs argument on this point are tantamount to an attack on the merits of the underlying assessment, and must therefore be rejected. The principal contention on appeal is that the failure of the government to produce the signed "summary record of assessment" indicates that no such document exists, and thus that a valid assessment was not effected. This, quite

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538-39 (9th Cir. 1992) (citing Elias, 908 F.2d at 527-28). In this instance, the district court granted summary judgement in favor of the government, finding that there was ample evidence that notice and demand had been received. The Koffs do not appeal the propriety of this finding.

plainly, is a challenge to the assessment, rather than to the procedures followed in creating the lien after the assessment was made. It is only the latter sort of challenge that may be brought in an action to quiet title under 28 U.S.C. §2410(a). The district court thus correctly refused to consider this allegation.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IRWIN KOFF and DARLINE RUTH KOFF,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant. /

No. CIV.S-91-172-DFL

ORDER

Plaintiffs bring this action pursuant to 28 U.S.C. §2410 to contest the procedural regularity of the tax lien imposed by the United States of america against their real and personal property. Plaintiffs filed their motion for summary judgement on April 2, 1991. Defendant responded by requesting additional time to produce proof that proper notice of the assessments was given. IN an order dated April 30, 1991, the court gave defendant additional time to produce the documents and file a supplemental opposition.

On July 8, 1991, defendant filed a supplemental opposition to Plaintiffs' motion for summary judgment. Plaintiff's filed a supplemental reply in response to defendant's opposition on July 17, 1991. According to the court's order of April 30, 1991, plaintiffs' motion for summary judgement is now submitted on the complete record.

28 U.S.C. §2410(a)[1] permits a person to challenge the procedural validity of a tax lien, but not the merits of the

[1] 28 U.S.C. §2410(a) provides that "the United States may be named a party in a civil action or suit in any district court, or in any State court having jurisdiction of the subject matter ... (2) to foreclose a mortgage or other lien upon ... real or personal property on which the United States has or claims a mortgage or other lien."

underlying assessment. See United States v. Polk, 822 F.2d 871 (9th Cir. 1987); Elias v. Connett, 908 F.2d 521, 527 (9th Cir. 1990).[2] One procedural claim which is proper under 28 U.S.C. §2410(a) is a claim that a valid notice of assessment and demand for payment under 26 §6303(a)[3] was not made. Id.[4]

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[2] A taxpayer may only challenge the merits of an assessment in Tax Court or upon payment of the assessment, in an action for refund in the Federal District Courts or the Court of Claims. Zimmer v. Connett, 640 F.2d 208 (9th Cir. 1981); citing Falik v. United States, 343 F.2d 38, 40-43 (2d Cir. 1965).

[3] 26 U.S.C. §6303(a) provides that: The secretary or his delegate shall ... within 60 days after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof...." Section 6203, 26 U.S.C. §6203 states that an assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules and regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment. Further, 26 C.F.R. §301.6203-1 states that "The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessments...." The taxpayer must be furnished the information set forth above upon request. Id.

Production of a Form 4340, Certificate of Assessments and Payments, is sufficient to prove that the proper procedure was followed. See United States v. Chila, 871 F.2d 1015 (11th Cir. 1989). The Form 4340 is the IRS form upon which the taxes due, notices given, steps toward collection, and payments received are recorded and compiled.

Defendant has produced a certified copy of the Form 4340 prepared in this case that indicates that notice and demand were made on October 30, 1989 and again on December 11, 1989. As further proof that notice and demand were made, defendant provided copies of letters written by plaintiffs acknowledging receipt of a Statement of Tax due. While defendant has not provided a copy of a specified notice and demand sent to plaintiffs, there is evidence that such notices are automatically computer generated and that actual copies of the notice sent are not retained and stored by the defendant. Plaintiff challenges the Form 4340 on the ground that it appears to have been computer generated for litigation purposes only. However, the Declaration of Dean Prodromos states that the Form 4340 is a compilation of information stored on computer converted to terms a lay person could understand. The actual Service Center Transcripts from plaintiffs' filed are also attached and interpreted, and substantiate the information contained in the Form 4340.

The Court finds that the Form 4340 is sufficient evidence that an assessment and notice and demand were sent to plaintiffs. United States v. Lorson Electric Co., 72-2 U.S.T.C.

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[4] See 26 U.S.C. §6321 (providing that a lien shall arise if a "person liable to pay a tax neglects or refuses to pay the same after demand (emphasis added)); 26 U.S.C. §6331 (authorizing the IRS to collect a tax by levy only where a taxpayer fails to pay a tax "within 10 days after notice and demand (emphasis added)).

para. 9614 (S.D.N.Y. 1982); Schmidt v. Internal Revenue Service, 717 F.Supp. 763 (D.Kan. 1989). Moreover, the letters written by plaintiffs in response to the assessments would erase any potential doubts, were the court convinced that more direct evidence were necessary. The court grants summary judgement for defendant.

IT IS SO ORDERED.

DATE: 18 September 1991

/s/
DAVID F. LEVI, Judge
United States District Court